Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	))	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Monthly Line Items and Surcharges Imposed by Telecommunications Carriers	)))))	

JOINT COMMENTS OF

CTC COMMUNICATIONS, CORP.
LEVEL 3 COMMUNICATIONS LLC
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
RCN TELECOM SERVICES, INC.
US LEC CORP.

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SUMMARY

CTC Communications, Corp., Level 3 Communications LLC, McLeodUSA Telecommunications Services, Inc., RCN Telecom Services, Inc., and US LEC Corp. (collectively, the "Commenters"), urge the Commission to reject the Petition for Declaratory Ruling ("Petition") filed by NASUCA. The Petition, if adopted, would create a host of jurisdictional, constitutional and policy problems that this Commission—and many other state and federal agencies—would be force to wrestle with in coming years.

The Petition, if adopted, would violate Section 2(b) of the Act, by placing impermissible limitations on the billings of intrastate services otherwise outside of the Commission's jurisdiction. The relief is unnecessary, as the existing Truth-in-Billing rules and the Commission's complaint process already provide adequate protection to consumers. Further, the relief requested by the Petition would impermissibly infringe upon the First Amendment rights of carriers.

Most of all, however, the Petition is simply bad policy. Severely limiting the availability of carriers to recover the actual costs associated with the provision of telecommunications services will cause competitive repercussions as consumers face increases in rates and less choice in the telecommunications marketplace. This Commission and other state and federal agencies will be deluged with requests to revisit every existing tax or assessment on telecommunications and mandate recovery of these costs from customers.

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CTC Communications, Corp., Level 3 Communications LLC, McLeodUSA Telecommunications Services, Inc., RCN Telecom Services, Inc., and US LEC Corp. (collectively, the "Commenters"), through their undersigned counsel, respectfully submit the following comments in response to the Petition for Declaratory Ruling ("Petition") by the National Association of State Utility Consumer Advocates ("NASUCA").[1] While Commenters support clear and accurate bills for telecommunications consumers, they oppose the sweeping, vague, and unwarranted relief requested in NASUCA's Petition. In these Comments, the Commenters address numerous flaws with the Petition, including, specifically, the jurisdictional, competitive, and constitutional issues raised by the Petition.

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[1] *See Truth-In-Billing and Billing Format*, CC Docket No. 98-170, Petition for Declaratory Ruling (rec. Mar. 30, 2004) ("Petition").

I. INTRODUCTION

The line-item charges on consumers' phone bills are legitimate charges that telecommunications carriers have the right to bill their customers to recover the actual costs of service. Aside from a few bad actors that may exist in the industry, the standard method of recovering theses costs—through line items—complies with the Commission's Truth-in-Billing Order[2] and Sections 201 and 202 of the Communications Act of 1934, as amended (the "Act").[3]

The requested relief is simply bad policy. The proposal offered by NASUCA is a radical departure from existing Commission policy regarding line items that was reaffirmed as recently as December 2002. NASUCA's requested relief would infringe on state jurisdiction, impose additional and unnecessary burdens on carriers and regulatory bodies, reduce consumer choices, and hide the costs of regulatory programs from consumers. The competitive and other adverse effects that would occur if the Commission granted the Petition could also be extremely harmful to carriers, especially competitive carriers. Further, granting the requested relief would impermissibly infringe on the first amendment rights of carriers. There is simply no reason to revisit this issue now in the manner requested by NASUCA.

II. UNDER SECTION 2(B), THE COMMISSION DOES NOT HAVE JURISDICTION TO PROHIBIT LINE ITEMS BASED ON STATE PROGRAMS

The Commission does not have jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier..."[4] NASUCA believes that the line items being billed to

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[2] *See Truth-In-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72, 14 FCC Rcd. 7492 (rel. May 11, 1999) ("TIB Order").

[3] Ch. 652, title I, Sec. 1, 48 Stat. 1064 (June 19, 1934), *codified at* 47 U.S.C. § 151 *et seq.*

[4] 47 U.S.C. 152(b)(1) (emphasis added).

customers by telecommunications carriers are unfair and in violation of the Truth-in-Billing rules of the Commission. However, some of these charges are not subject to the jurisdiction of the Commission because they are based on state programs, which are a part of intrastate commerce.[5]

For instance, line items for state programs such as state universal service or TDD charges may appear on a customer's bill. Similarly, state or municipal taxes, state regulatory fees and/or state or municipal franchise fees may also be included as line items. In short, state and local governments place numerous assessments on telecommunications services and telecommunications carriers. Unless specifically prohibited by the state or local authority, currently carriers may pass such assessments through to consumers.

Many states charge taxes and surcharges solely on the intrastate portion of a customer's bill. These intrastate charges are subject to the jurisdiction of the applicable state PUC. Therefore, under Section 2(b) of the Act, the Commission does not have the jurisdiction to grant the relief requested by the Petition and should deny it accordingly.

III. SECTIONS 201 AND THE INFORMAL COMPLAINT PROCESS PROVIDE CUSTOMERS ADEQUATE REMEDIES TO DISPUTE UNREASONABLE PASS-THROUGH CHARGES

If customers of telecommunications carriers are upset with charges on their phone bill, they have the right to complain to the Commission or state commissions. Each state commission has its own procedures to consider consumer complaints, as this Commission. Under Section 201 of the Act, all charges for telecommunications service must be just and reasonable.[6] If a charge is not just and reasonable, a customer can contact the FCC. Complaints by consumers

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5 NASUCA expressly refers to state and local charges over which the Commission does not have jurisdiction. *See Petition* at vii ("Rather, NASUCA is asking the Commission to declare that carriers are prohibited from imposing line items unless those charges are expressly mandated by federal, *state or local* regulatory action." [emphasis added]).

6 47 U.S.C. § 201.

can be filed electronically, by e-mail, by postal mail, or by fax.[7] All a consumer needs to include to file a complaint with the Commission is: (1) their name, address, and the telephone numbers involved in the complaint; (2) a telephone number where they can be reached during the business day; (3) specific information about their complaint, including all companies involved; (4) the names and telephone numbers of the company representatives that they contacted, including the dates they spoke with these representatives and other information that would help in processing their complaint; (5) a copy of the phone bill with the disputed charges; and (6) the type of resolution they are seeking.[8] According to the Commission, "filing a complaint with the FCC is EASY."[9] This is a simple process that takes little time and is more than adequate for addressing NASUCA's concerns. To the extent that NASUCA believes carriers are abusing the Truth-in-Billing rules with excessive, duplicative or erroneous line items, the solution is to encourage consumers and consumers advocates to seek appropriate remedies under the existing rules, not to create more rules that are more restrictive than necessary.

IV. NASUCA's Requested Relief Violates Carriers' First Amendment Rights to Free Speech

The Petition is also troubling because it seeks to constrain commercial speech in an unconstitutional manner. It is well established that commercial speech may be infringed only when a three-part test is met: (1) the government must assert a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly advances that interest; and (3) the regulation must be narrowly drawn to minimize the

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7 *See* Commission's website, http://www.fcc.gov/cgb/complaints.html.

8 *See* Commission's website, http://www.fcc.gov/cgb/complaints.html#whatweneed.

9 *See* Commission's website, http://www.fcc.gov/cgb/complaints.html. (Emphasis included in original).

speech-chilling effects of the regulation.[10] An overarching threshold is that the speech that the Commission seeks to suppress must, in some way, be inaccurate or confusing.[11]

Contrary to NASUCA's allegations, the line items about which NASUCA complains are not inaccurate or confusing. Carriers, through filed tariffs or disclosures in their terms of service (many of which are mentioned by NASUCA in the Petition), describe the nature of the charges. Existing Truth-in-Billing regulations already specify the level of detail that carriers must utilize when describing such charges to customers and require that such descriptions be accurate. For instance, the Commission already prohibits carriers from describing a USF pass-through charge as "mandatory" or otherwise stating that it is a direct charge from the government.[12] If carriers are violating these rules, the remedy is to enforce them, not to abandon them and prohibit such commercial speech altogether. It is difficult to fathom why suppressing commercial speech in order to "hide" the true costs of common carrier regulation from customers would qualify as a substantial government interest.

Even if one assumes *arguendo* that the interest is legitimate, the Petition fails the latter two portions of the test. The proposed restriction does not materially advance the Commission's existing regulatory interest in ensuring accurate bills for consumers. To the contrary, as more fully explained below, the proposed rule actually provides less accurate information concerning the costs of telecommunications services. Further, it seeks to prohibit outright collection of fees

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10 *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-564 (1980).

11 *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43 (rel. Feb. 26, 2002), at ¶ 105 (*citing Lorillard Tobacco Co. v. Reilly*, 121 S.Ct 2404, 2421-22 (holding that inaccurate commercial speech is not entitled to first amendment protection).

12 *TIB Order,* 14 FCC Rcd. at 7522-7533, ¶¶ 49-64.

and charges that carriers must pay as a condition of providing telecommunications services. In effect, NASUCA asks the Commission to determine that such costs must be hidden in the service charge unless the applicable regulatory authority has mandated that a specific program fee be recovered from consumers.

Thus, under the First Amendment requirements for prohibiting commercial speech, the Petition must fail. Carriers with legitimate, accurate, and specific line items would have their ability to present this information severely curtailed without advancing any legitimate regulatory interest. Such a result simply cannot stand constitutional scrutiny.

V. PROHIBITING LINE ITEM CHARGES THAT ARE NOT APPROVED BY REGULATORY BODIES IS BAD PUBLIC POLICY

NASUCA is asking the Commission "to declare that carriers are prohibited from imposing line items unless those charges are expressly mandated by federal, state or local regulatory action."[13] To grant this requested relief would be bad public policy that would conflict with past policy of the Commission and would impose unnecessary burdens upon the Commission, state authorities and telecommunications providers.

NASUCA requests that line items should be permitted only if they are mandated by the governing regulatory body. This standard would be costly to implement and could result in a host of additional proceedings before the Commission and state and local regulatory bodies. Government bodies do not always specifically address recovery of taxes and surcharges by carriers and thus carriers that wanted to retain their line items would be forced to expend considerable resources researching whether pass-through was mandated or permitted and/or seeking permission to pass through the charge. In some cases, clarification of an existing order may be necessary. In other cases, new proceedings may have to be opened in order to address

13 *See Petition* at vii.

cost recovery requested by carriers or the unintended effects of granting the relief requested by NASUCA.

An example of an unintended consequence of granting NASUCA's petition is the possibility of harming resellers, especially those resellers offering local service on a total service resale basis. For example, resellers are exempt from paying USF to underlying carriers. However, if the underlying carriers are forced to include USF and other line items in their base monthly service (or per minute) charges, the reseller would in effect be forced to contribute to USF twice, once directly and a second time by paying the wholesaler's contribution which is buried in the service price. As another example, assume a monthly service of $40 is entitled to a 25% discount, or a wholesale price of $30. If the ILEC increases the basic service charge from $40 to $50 a month to recover line items it may no longer bill, applying the discount would result in the wholesale rate increasing to $37.50. The reseller, in turn, will then be charged USF and other fees on its retail service, resulting in effectively a double charge on resellers—and their customers, unless the states are required to re-establish new wholesale discounts that effectively remove surcharges as avoided costs. Likewise, carriers who resell the RBOCs special access services will be forced to effectively contribute twice to USF, unless the RBOCs are required to develop unique wholesale and retail tariff offering for special access service. The Commission has already rejected such double-counting as bad public policy that distorts competition by disadvantaging resellers.[14] It should reject NASUCA's request for the same reason.

If the relief is granted, it will result in many, if not all, carriers shifting the line item charges into the basic rate of the phone bill in order to cover the actual program fees, additional costs (such as payphone fees), and administrative costs. Thus, consumers will experience an

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14 *Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Report and Order*, FCC 97-157, 12 FCC Rcd. 8776, (rel. May 8, 1997), at ¶¶ 845-47.

increase in their basic rates, and will actually have less transparency on their phone bill. Under the current industry norms, customers receive clear signals of the cost elements in their total telecommunications bill. Basic service costs a certain amount and is billed separately. Federal and state taxes add to that base amount. Federal and state USF, TRS, regulatory fees and other line items also add to the total. Lastly, the administrative costs of complying with reporting obligations further adds to this cost.

Under the proposed rule, consumers would be deprived of the opportunity to use telecommunications more efficiently because they would not have knowledge of the true expenses of certain telecommunications services. Certain calls cost more than others; as an example, dial-around calls placed from payphones incur extra fees and impose additional costs on carriers. Carriers thus justifiably add surcharges to reflect these additional costs incurred in providing the service. Absent the ability to identify and charge customers for these costs, carriers will be forced to spread these costs among all consumers, even if the consumer makes no payphone calls. Customers will thus see a spike in basic rates, and will be unable to alter their calling patterns to reduce their telecommunications expenses.

Fewer choices would be available to consumers if NASUCA's relief were granted. Because the line items would be included in package rates, the rates charged by carriers would become more homogenized. While currently different providers are able to offer consumers many different plans and many different rates, if line items must always be included in package rates, it would force carriers to offer a less diverse set of service plans. A telephone service provider would have a disincentive to offer some of the lower cost plans because they would have a more difficult time recovering their additional, compliance and administrative costs from these customers. Further, while some carriers currently offer no line items as a marketing tactic, these carriers would lose that distinction if all carriers were required to absorb line items in a single basic rate.[15] Customers who wish to receive the lowest maximum monthly rate gravitate to different carriers, the result of a competitive market. In sum, granting the Petition would result in less choice for consumers, and would inevitably raise rates.

Forcing carriers to include line items in their rates is anticompetitive and may penalize certain consumer or product segments. Requiring carriers to bundle line items in rates may result in subsidization of one type of consumer by another. It may also effectively penalize certain types of customers or products. As an example, carriers may elect to double or triple recover line item amounts in rates they charge for services that are less price elastic, in order to be more competitive on more elastic services. In these instances, carriers who are properly recovering line items equally across all customers may be placed at a competitive disadvantage.

Lastly, the Petition does not, on its face, appear to be restricted to residential customers. Business customers may be under long term contracts for specified rates that explicitly contemplate line items and fees be charged in the ordinary course of business. As sophisticated consumers, business customers can negotiate low per minute rates or fixed cost contracts, depending on their specific wishes. Requiring carriers to cease charging line items may jeopardize the viability of carriers who have numerous long term contracts that fix a basic service price and permit line items to be added to the agreed upon basic service price. If such line item charges are made illegal, carriers may be placed in a position where they have no means to recover the costs until the term of their contracts has been completed.

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15 *See e.g.*, Virgin Mobile USA's website, www.virginmobileusa.com, offering "No monthly bills, No hidden fees, No extra charges for weekend, night, or long-distance calls". While their per minute pricing is higher than other wireless carriers, the product is appealing to consumers who want one rate pricing.

VI. If the Commission Grants NASUCA's Petition, it Cannot Do So Without Seeking Comment on Whether to Approve Line Items For Each Regulatory Program Under its Jurisdiction

If NASUCA's Petition is granted, the Commission can expect a deluge of requests regarding whether pass-through should be authorized for each and every existing charge. In addition to the administrative burdens of such request, it is not clear the Commission will be able to permit the pass through of some of these charges. For instance, in a recent USF Order, the Commission considered and rejected the so-called "collect and remit" regime. Among the complaints raised by commenters in the USF docket was that such an approach impermissibly transferred the obligations for carriers to contribute to customers, in violation of Section 254 of the Act.[16] Indeed, NASUCA even stated in its comments that USF line items should not be mandated.[17] Yet as explained above, this will result in the same discrimination against resellers that the Commission previously rejected as bad public policy. Thus, for each and every program, including regulatory fees, TRS, payphone compensation and NANPA, the Commission should review each and every one of the programs again, prior to granting the petition, to determine the impact on carriers and competition.

Further, the Commission will be creating similar obligations for other federal and state agencies. The Department of Treasury, state regulators, municipal governments and state taxation authorities can all expect similar requests for clarification on whether their tax or charge may or must be passed through to consumers. Alternatively, state commissions and taxing

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16 *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 02-329 (re. Dec. 22, 2002) at ¶ 38, n.106.

17 Comments of the National Association of State Utility Consumer Advocates, Docket CC 96-45, filed April 22, 2002, at 17. Of course, NASUCA eventually argues that all surcharges should be prohibited. Such a result is certainly unlikely, as some charges will be mandated by state or federal agencies.

authorities could be inundated with requests to revisit numerous existing charges and taxes. For instance, state commissions may have made the recovery of certain fees for consumers optional, or may have been silent on the issue. Now, each and every one of these existing programs may face review as carriers seek specific orders mandating recovery of these charges from consumers. The Commission must be cognizant of the additional burdens granting NASUCA's petition may impose on these regulators.

VII. CONCLUSION

For the reasons stated above, Commenters urge the Commission to reject NASUCA's Petition.

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